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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF ARIZONA**

8 Benton Gene Baskin,
9 Plaintiff
-vs-
10 Todd Thomas, et al.,
Defendants.

CV-21-1890-PHX-SPL (JFM)

Order

11 Plaintiff's third Motion to Appoint Counsel (Doc. 38) seeks appointment of counsel
12 pursuant to 28 U.S.C. § 1915(e)(1), citing as cause Plaintiff's inability to retain counsel,
13 the inconveniences of his incarceration and the resulting impact on his ability to conduct
14 research and investigations (including the limited legal resources (research and word
15 processing) available to Plaintiff), the need to respond to the motions to dismiss (which
16 he argues are the equivalent to motions for summary judgment) and/or transfer, and a
17 likelihood of success and complexity of the issues.

18 Although briefing on the motion is not complete, the Court finds further briefing
19 unnecessary to a fair adjudication of the motion.

20 In rejecting Plaintiff's prior motions for counsel the Court has addressed the
21 exceptional circumstances standard, *see Wilborn v. Escalderon*, 789 F.2d 1328, 1321 (9th
22 Cir. 1986), and has concluded that the issues in this case are not complex, and the
23 inconveniences of Plaintiff's incarceration do not render them complex. The Court further
24 concluded Plaintiff had not shown a likelihood of success on the merits. (*See Order*
25 *12/15/21, Doc. 6; Order 3/10/23, Doc. 32.*)

26 Plaintiff's reference to the pending motions to dismiss do not alter that
27 determination. Although presumably unfamiliar territory for Plaintiff, such motions are
28 routine in prisoner civil rights cases and do not create exceptional circumstances. The

1 only portion of the motions not routine relates to the jurisdictional question whether this
2 case is properly brought in the District of Arizona. Again, however, that issue is not
3 complex. Even if not routine, Plaintiff continues to show himself amply capable of
4 addressing issues of such complexity, including by inserting issues developed by Plaintiff
5 on his own, *e.g.* arguing that the motions to dismiss on exhaustion amounts to a motion
6 for summary judgment. (Motion, Doc. 38 at 3.)

7 Plaintiff further asserts that the motion to dismiss on exhaustion is complex because
8 “a pro se prisoner lacking sophistication is [unlikely] to respond to a motion to dismiss for
9 failure to exhaust administrative remedies.” (Motion, Doc. 38 at 3.) To the contrary, this
10 Court’s experience is that even prisoners with far less demonstrated ability to litigate than
11 Plaintiff routinely respond to such motions. Further, Plaintiff demonstrates his unique
12 ability in his arguments regarding the ordinary propriety of summary judgment to resolve
13 exhaustion issues.

14 As for a likelihood of success on the merits, Plaintiff’s prior request proffered
15 nothing other than various medical records to demonstrate his ability to establish the
16 elements of his claims. The Court concluded “[w]hile these may document injury, they
17 do not establish all the elements of deliberate indifference nor do they ascribe any such
18 deliberate indifference to any particular defendant.” (Order 3/10/23, Doc. 32 at 1.)

19 Plaintiff now argues that Defendant Westbrook’s actions violated his employer’s
20 policy of protecting prisoners, thereby establishing deliberate indifference. (Motion, Doc.
21 38 at 3.) But a violation of such policies establishes deliberate indifference only if
22 Plaintiff can prove “both (1) that the failure to follow procedure put [Plaintiff] at risk and
23 (2) that [Westbrook] actually knew that his actions put [Plaintiff] at risk.” *Peralta v.*
24 *Dillard*, 744 F.3d 1076, 1087 (9th Cir. 2014). Plaintiff offers nothing to suggest that such
25 was the case. Moreover, the generalized nature of the policy described by Plaintiff does
26 little to suggest that the policy put Westbrook on notice of any specific potential risk to
27 Plaintiff.

28 Plaintiff adds nothing to show deliberate indifference by Defendants Giboian and


1 Diaz, nor does he suggest they were subject to the same policy. Moreover, Plaintiff fails
2 to suggest that he will prevail in light of the procedural defenses raised in the pending
3 motions.

4 In sum, Plaintiff continues to show himself well capable of addressing the issues in
5 this case (at least as compared to other prisoners, if not overall), and fails to establish a
6 likelihood of success on the merits.

7 **IT IS THEREFORE ORDERED** Plaintiff's Motion to Appoint Counsel (Doc. 38)
8 is **DENIED WITHOUT PREJUDICE**.

9 Dated: June 9, 2023

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James F. Metcalf
United States Magistrate Judge